Glosser Bros. Inc., d/b/a U-Save Food Warehouse *and* United Food and Commercial Workers Local Union No. 23, AFL-CIO-CLC. Case 6-CA-16010

31 July 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

On 1 March 1984 Administrative Law Judge Thomas R. Wilks issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In the circumstances of this case we agree with the judge that the Respondent reasonably could have concluded that employee Burkett did not desire union representation. In doing so, we find it unnecessary to consider the judge's statement that an employee who is hired after the voluntary recognition of a union is presumed to support union representation.

The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

DECISION

STATEMENT OF THE CASE

THOMAS R. WILKS, Administrative Law Judge. Pursuant to a charge filed by the United Food and Commercial Workers, Local Union No. 590, now Local Union No. 23,[1] AFL-CIO-CLC (the Union), on December 17, 1982 (amended May 4, 1983). A complaint was issued on May 5, 1983, alleging that Glosser Bros., Inc., d/b/a U-Save Food Warehouse (Respondent), has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the National Labor Relations Act. Respondent filed an answer denying the commission of the alleged unfair labor practices.

[1] By its answer, Respondent admits Local 23 is a successor to Local 590.

A hearing was held before me at Altoona, Pennsylvania, on September 29, 1983. All parties were afforded full opportunity to present competent, relevant, and material evidence. Subsequent to the close of the trial, the General Counsel and Respondent have submitted briefs. On the entire record, and from my observation of the demeanor of the witnesses, I make the following[2]

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is a Pennsylvania corporation and maintains its principal office in Johnstown, Pennsylvania. Respondent is engaged in the business of operating retail grocery stores in the Commonwealth of Pennsylvania. During the 12-month period preceding the issuance of the complaint, which is representative of all times material herein, Respondent purchased and received goods valued in excess of $50,000 directly from suppliers outside Pennsylvania. During the same period of time, Respondent, in the course and conduct of its business operations, received gross revenue in excess of $500,000.

It is admitted, and I find, that Respondent has been at all times material herein an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Respondent admits, and I find, that the Union has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICE

A. *The Issue*

The parties stipulated that the "sole issue which must be resolved in this present proceeding, based on the pleadings to date, is whether [Respondent] entertained a reasonable and good-faith doubt under applicable precedent as to the Union's continuing majority status among bargaining unit employees when the [Respondent] withdrew recognition from the Union on November 24, 1982," and thereafter engaged in certain unilateral conduct.

Respondent's answer, however, raised as a defense the actual loss of the Union's majority status, and Respondent in its brief reserves that alternative defense. The General Counsel relied on the stipulation and did not direct its brief to the issuance of the actual loss of majority status.

B. *Background*

Many of the underlying facts in this case are either stipulated or uncontested.

Respondent operates a chain of some 15 retail grocery establishments, of which 13 may be described as supermarkets and 2 as "food warehouse" outlets, i.e., a form of retail food discount merchandizing. The parties have

[2] The joint motion to correct transcript by Respondent and the General Counsel is granted.

maintained an amicable collective-bargaining relationship for a period in excess of 20 years during which the Union has represented Respondent's meat department employees in 13 of 15 stores in separate bargaining units.

On February 23, 1982,[3] Respondent opened its first warehouse type outlet in Altoona, Pennsylvania (the Altoona store). Exclusive of various other departments, there were six employees employed in the meat department of the Altoona store when it opened: meat department manager and meatcutter Ramon Ibarra, meatcutters Robert Knisely and Carl Conway, apprentice cutter Joe Maus, and wrappers Debbie Gardner and Diane Lenhart.

Ibarra's status as a nonsupervisory working foreman and bargaining unit member is conceded by the parties. However, he exercises leader-type functions and serves as a conduit between the employees and management, i.e., employees relate through him complaints of working conditions, and management looks to him as a recognized senior, respected father figure among the employees and one who is cognizant of employee sentiment. Ibarra had been a member of the Union prior to his transfer to the Altoona store when he had been employed as a meat manager at one of Respondent's unionized stores.

After the opening of the Altoona store, Union Business Representative George Yurasko utilized Ibarra as a contact person for union organizing efforts. Through Ibarra, Yurasko met with and solicited representation authorization from the meat department employees at a nearby restaurant. Ibarra discussed union representation with the meat department employees individually. He testified that, except for Maus and Conway, they all indicated a desire and intention to authorize union representation. Ibarra thereupon also decided on such course of action. According to Ibarra, Conway then and continuously thereafter objected to union representation, and refused to authorize representation, while Maus refused to execute written authorization and expressed indifference. Between February 22 and 24, the four meat department employees, exclusive of Conway and Maus, executed printed cards which requested union membership and authorized union representation.

Pursuant to a demand for union recognition of the Altoona store meat department, Union President Draper met with Respondent Corporate Secretary and Labor Relations Manager William Glosser on February 25 and presented him with a photocopy of the four executed cards. William Glosser, who had long dealt with Yurasko, as well as Union President Draper, readily extended recognition on an inspection of the photocopy and made no verification of employee signatures. On February 26, voluntary recognition was, in writing, extended to the Union as exclusive bargaining agent for all meat department employees, including manager, meatcutters, apprentice meatcutters, and wrappers, i.e., the six meat department employees.

The Altoona business quickly warranted the hiring of three more employees as follows:

Theodore Musselman—Apprentice cutter—March 2
Charles Kendall—Meatcutter—March 16
Timothy Burkett—Meatcutter—March 23

Thus the complement of the meat department rose to a total of nine where it remained unchanged through all times material herein. At no time hereafter did the Union augment its original showing of majority status by presenting to Respondent additional authorization cards.

About February 26, Draper requested that the parties commence negotiations for a collective-bargaining agreement in late March or early April. Actual negotiations commenced on May 19 between Respondent's representatives William Glosser, his brother Paul Glosser, president of Respondent, and union representatives Adolph Conti and George Yurasko at the Union's offices. The Union presented a detailed contract proposal which was thereupon discussed. That proposed contract was similar to contracts in effect at about 13 other Respondent stores. Also the Union requested and Respondent promptly submitted to it certain information necessary for bargaining. The parties again met on June 24, i.e., Draper now joined Yurasko as union negotiator. Respondent presented a detailed proposed contract containing new proposal terms and terms previously agreed to by the parties. Respondent explained its desire to tailor the contract to the warehouse-type merchandizing at Altoona which was new to its operations. On July 27, W. Glosser, P. Glosser, Draper, and Yurasko met again and discussed Respondent's second proposed contract which contained newly proposed terms and terms which had been previously agreed on by the parties.

During negotiations of May 19, June 24, and July 27, and during numerous telephone conversations and correspondence between the parties, the Union and Respondent had by July 27 reached a tentative agreement on an entire contract with the exception of wage rate and health and welfare provisions. As the July 27 session ended, Draper informed Respondent that the Union intended to conduct an internal meeting of its "Health and Welfare Committee" on August 12 in order to discuss and obtain possible committee authorization for changes in its health and welfare program in order that such program changes could significantly reduce a participating employer's contribution to the Union's health and welfare fund and thus allow for a higher wage rate. Accordingly, at the July 27 meeting the parties agreed to postpone negotiations for the purpose of providing the Union with an opportunity to hold such internal meeting, after which the Union was expected to present its "new" health and welfare package to Respondent.

On August 13, Draper telephoned W. Glosser and informed him that the Union had postponed until December reconsideration of its health and welfare proposal. Draper explained that the Union was unavailable to continue negotiations with Respondent because it was too busy, i.e., preoccupied with the potential closing of the Altoona division of the A & P supermarket chain, a nearby competitor of Respondent. W. Glosser asked, "Well, when will we meet again?" He also asked whether the next meeting would be in December. Draper responded, "No, don't call me. I'll call you."

[3] All dates refer to 1982, unless otherwise specified.

The Union represented the Altoona area employees of A & P and became involved in negotiations concerning the proposed closure of those stores which was reported upon extensively by the news media, trade journals, television stations, and a Pittsburgh, Pennsylvania newspaper. According to Yurasko, A & P demanded certain economic concessions in return for nonclosure. The A & P Altoona division covered a broad area of west central Pennsylvania, western Maryland, and the "panhandle" area of West Virginia. In that area, the Union represented about 600 A & P employees in 40 stores, of which Yurasko serviced 34 stores. In late September the A & P stores were closed. Even after the closure, the Union was engulfed with work related to closure and its impact on A & P unit employees, and related grievances, hearings, negotiations, and arbitration proceedings. Furthermore, the Union was confronted with a potential crisis involving a demand by the Kroger store chain to discuss economic contract concessions for its western Pennsylvania stores affecting 3500 bargaining unit employees represented by the Union.

The Union did not make any further communications with Respondent regarding the Altoona store meat department unit until November 18, at which time Draper telephoned William Glosser and requested a resumption of negotiations. They tentatively agreed on December 2 as a date to resume negotiations, subject to confirmation of the date by Respondent's other representatives. Glosser immediately sent notices of the meeting to Respondent's labor attorney Vadnais, and its corporate attorney, Coopersmith. The next day, Coopersmith called William Glosser and informed him that there were problems at the Altoona store. Coopersmith suggested to Glosser that it would be wise to confer with Vadnais and Paul Glosser before proceeding to any further negotiations with the Union.

Vadnais, Coopersmith, and the Glossers held a series of conversations regarding whether or not to withdraw recognition from the Union. Certain incidents relayed by Ibarra and Store Manager Tracy Thompson to Paul Glosser and other factors, allegedly, led Paul Glosser to decide to withdraw recognition from the Union, and William Glosser was directed to draft a letter to that effect. Recognition was withdrawn on November 24, by letter to Draper, informing the Union that Respondent had formed a good-faith doubt as to whether the Union still enjoyed the support of a majority of the unit's employees. Since that time, Respondent has instituted changes in employee benefits and increased wages and has continued to refuse to bargain with the Union.

There is no contention that Respondent engaged in anything other than meaningful good-faith bargaining. There is no evidence that Respondent was motivated by a desire to avoid recognition and bargaining for economic or any other reason. The parties stipulated that the Union had been provided a reasonable period of time within which to negotiate a contract.

C. *Evidence of Union Majority Status Loss*

Respondent submits that Paul Glosser relied on a series of events, circumstances, reports, and statements which warranted a reasonable belief that the meat department unit employees no longer desired to be represented when he made the decision to withdraw recognition from the Union.

The first of these events was communicated to Glosser in August when Thompson told Glosser that Ibarra and Gardner had complained that the meat department employees had not received certain pay raises and bonuses which they had been promised by Respondent when the store opened, while all other store employees had received raises.

According to Ibarra, the meat department employees frequently asked of him the progress of negotiations during the summer and asked him what there was to report, and that, pursuant to their requests, he telephoned Yurasko but was told of nothing "definite." Later in the summer he was told of the Union's problems with A & P. Ibarra testified that the meat department employees complained to him of the lack of a pay raise, the lack of negotiation progress, and the failure of the union agents to visit them during the course of negotiations. He testified that he frequently conversed with Store Manager Thompson during the summer and relayed employee complaints to him, but at that stage he did not mention specific employee names to Thompson nor the number of such employees. No steward for the unit was ever appointed by the Union.

Thompson relayed the employee complaints to Paul Glosser who testified that Thompson's report of employee complaints over the nonreceipt of a wage increase in the face of wage increases for other store employees was made in mid-August, and that pursuant to that report Glosser visited with the Altoona meat department employees in the first or second week of September.

Immediately prior to this meeting, Ibarra spoke to Glosser and expressed to him that the employees were extremely upset that they had not received pay raises. During the meeting with unit employees, Glosser explained to them that they were now represented by the Union and that he was prohibited from giving them raises without having bargained first with the Union. Glosser then asked the employees if they had any comments. There was no response. Glosser testified that he was puzzled by their silence and was concerned that the situation might affect their work. Therefore he spoke to Ibarra after the meeting in an effort to obtain more details. Ibarra told Glosser that he and the other employees were upset about not getting their raises and dissatisfied with the Union's lack of action. But he did not relate to Glosser any specific details of employee dissatisfaction and the conversation concluded on this general statement.

During September and October, Glosser continued to receive reports from Thompson concerning employee attitudes regarding the Union. Thompson testified that employees had expressed their dissatisfaction with the Union directly to him, and that he related these comments to Glosser. Thompson testified that in mid or late summer Conway told him, "I won't be represented by anybody including 590 without having a vote on it." He testified that at the same time Kendall stated, "I won't be represented by 590 or George Yurasko over my dead

body. I'll quit first." According to Thompson, similar statements by Kendall and Conway were repeatedly made to him. Thompson also testified with regard to a single comment by Burkett in late July or August as follows:

> Jim Burkett one time made a comment in the break room to me that he was just glad to be working, and he was a former A & P employee and he was glad to be working and working forty hours a week, and he didn't feel representation was necessary. So that was his statement.

Thompson also relayed to Glosser expression of employee dissatisfaction with the Union which he received from Ibarra.

Ibarra testified that the earlier summer conversations he had with Thompson were of a generalized nature but that as September approached he received more frequent and vehement complaints from meat departments employees regarding the Union and he therefore became more specific in his reports of these complaints to Thompson and reported those incidents to him and told him that employees were "getting tired being . . . just left hanging on a string while they [the Union] were taking care of A & P business." His uncontradicted accounts of such incidents are as follows.

Ibarra testified that he commuted 5 days a week by carpooling with Knisely, Musselman, Burkett, and Kendall. From September though November these employees on occasion discussed the Union during their rides to and from work. His general conclusion was that these employees were dissatisfied with union representation. More specifically, when asked what was said by the individual employees, Ibarra testified that "Musselman was upset that the Union had not come in like they said they were going to. They had promised him they would take care of us right away." Furthermore, Ibarra testified that "Kendall said he'd quit before the Union would represent him . . . because they hadn't done anything for anybody."

In addition to the carpool conversations, on several other occasions similar remarks were directed to him by the employees. Sometime approximately in September Musselman and Kendall on separate occasions told Ibarra that if the Union did not make progress in negotiations "soon" they then would not "want anything to do with the Union." About the same time period, Gardner stated to him in more final and absolute terms that she "no longer wanted [to be] represented by [the Union]." Ibarra testified that he reported employee complaints of the lack of union initiative and had given Yurasko a 2-week deadline in October "to do something." Yurasko denied the deadline setting but admitted that Ibarra had reported to him that they were upset as to the lack of movement in negotiations.

Thompson was confused and uncertain as to exactly what Ibarra reported to him short of recalling that Ibarra stated the complaints to him and he relayed them to Paul Glosser; and they were related to employee frustration concerning the lack of "results they were getting from [the Union]." Thompson did not recall that Ibarra had named specific employees. Ibarra, however, testified with certitude that during the later stages of these conversations he named specific employees when he reported their complaints to Thompson. Ibarra's testimony is credible in light of Paul Glosser's certain, convincing and credible testimony that Thompson related the details of Ibarra's reports to him, including accounts of carpool conversations, the "dead body" statement, etc.

About mid-October during Paul Glosser's visit to the Altoona store he engaged in a conversation with Ibarra. According to Glosser, Ibarra told him that he was planning to ask the Union to return his original representation authorization and membership card. Glosser did not recall with detail what was said but recalled that Ibarra related the dissatisfaction of the unit employees with lack of a pay raise, Ibarra's own dissatisfaction with the union, and that he, Glosser, concluded that Ibarra was stating a desire to "get out of it." As to this particular conversation, Ibarra was more detailed in his recollection. According to Ibarra, he told Glosser not only that he was requesting a return of his authorization card but that he told him also, "*we* was going to be no longer represented by the union." Ibarra in his testimony explained that this decision was made after Gardner had told him she no longer wanted union representation, and that he concluded that a majority of employees no longer wanted representation and a request for his own card would end union representation.[4] By letter dated November 8, Ibarra requested that the Union return his original authorization card and stated, "At this time I am no longer interested in Union Representation." Shortly after he sent that letter, Ibarra communicated with Paul Glosser. Ibarra testified that he met with Glosser, told him that he had requested the return of his card, and that he "no longer wanted to be represented by the Union." He further testified:

> I just told [Paul Glosser] that I felt my people were upset that the Union and the Company had not come to an agreement in nine months, and I felt that something should have been done by that time.

Ibarra testified that he did not identify specific employees because Paul Glosser stated that he was not interested in their identities. According to Paul Glosser, Ibarra stated, "I feel the majority of the people don't want the Union." He further testified:

> From the tenor of his conversation it was "the people don't want the Union, therefore I don't want the Union," and that's why I asked for my card back.

Glosser's account of the second conversation regarding union card withdrawal is more in accord with Ibarra's version of the first conversation. Although recollec-

[4] Ibarra's conclusion was based on his observation that Conway by explicit remarks retained his original opposition, that Kendall and Gardner had expressed rejection, that Maus never authorized representation, that he himself no longer wanted representation, and that the others had also rejected it in light of their dissatisfaction with the course of negotiations and lack of union presence at the store.

tions are in part inconsistent as to sequence and somewhat confused in details, essentially Ibarra and Glosser corroborate one another to the effect that Ibarra reported to Glosser that a majority of unit employees did not want union representation. Certainly Glosser's then understanding as to what Ibarra was stating was in accord with Ibarra's conclusion, i.e., loss of union majority status.

There are only two areas where there are significant factual disputes. The first involves the minor point as to whether Yurasko made any appearances at the store after the certification and after a brief meeting where he told employees that negotiations were about to take place. Ibarra recalls no visits. Yurasko, with more certitude, testified as to an October visit when he investigated Musselman's complaint as to his apprentice classification, i.e., Musselman thought he ought to be a journeyman. He also cryptically recalled a single visit on July 29 after the last negotiation session "to discuss the Company's proposals." Even crediting Yurasko, it is clear that union representatives' visits to the store to meet with the employees to discuss or to report the progress of negotiations during the course of those negotiations prior to mid-November were extremely limited. Store Manager Thompson therefore not only had relayed to him employee complaints of the virtual lack of union presence, but also was able to observe the lack of such presence firsthand.

The second area of factual dispute involves a much more substantial matter, i.e., whether Yurasko visited the Altoona store on November 17 or November 30. The General Counsel's witnesses Ibarra, Thompson, and Paul Glosser testified directly and indirectly as to events which necessarily place the date as on November 17. Yurasko placed it on November 30. The written withdrawal of recognition was, according to a time stamp entry, received by the Union at its office on November 30. Yurasko, with hesitant demeanor, testified that the purpose of his visit on November 30 was to notify the employees of the resumption in negotiations in a few days and to investigate whether Respondent had granted raises or changed employment conditions and to "hear what was going on prior to the negotiations meeting." He testified that he had not become aware of the withdrawal of recognition until December 2. He further testified, without competent documentary or testimonial corroboration, as to his involvement with union elections during the week of December 7 and that such election included in his own position although he was not opposed for reelection.[5]

I credit Paul Glosser's testimony that Yurasko's visit was reported to him by Thompson on January 18. I found Paul Glosser to be a reliable witness who, like all witnesses, was subject to occasional lack of detail and obscurity, but whose demeanor was marked by certainty, and the kind of spontaneity and responsiveness indicative of candor. Moreover, there is no basis in the record upon which I can infer that any of Respondent's witnesses possessed any motivation to misrepresent the facts. As noted elsewhere, Respondent was not shown to have harbored any antiunion, or anticollective-bargaining bias. Paul Glosser's certitude as to the date of the Yurasko visit was matched by Thompson who related the event to the date of the opening of Respondent's second warehouse-type store, i.e., the College Park store, as well as to Thanksgiving Day holiday. The date of the College Park store opening was not contradicted. According to Thompson, Ibarra, and Yurasko, Ibarra was not present among the employees during Yurasko's visit with them. According to Ibarra and Yurasko, Ibarra, as well as employee Lenhart, was present at the opening of the College Park store at the time of the Yurasko visit at Altoona. Thus they vehemently recall the visit as occurring on November 17, which would place it 1 day before Draper telephoned William Glosser to request a resumption of bargaining. Ibarra's timecard indicates that this time was charged to the Altoona store on November 30 and for that entire week, and thus suggests that he worked there that week. The timecard, however, is inconclusive in and of itself. As will be discussed, Yurasko was subjected to employee criticism of the Union when he met with them. There is nothing else to suggest that any other particular event or consideration might have precipitated the Union to make the November 18 request for bargaining resumption. The criticism of employees on November 17 suggests an explanation to the otherwise unanswered question as to why the Union finally made efforts to resume bargaining when it did. Yurasko's explanation for his motivation to visit the Altoona store on November 30 is not convincing. If it were his intention to announce the resumption of negotiations to disgruntled unit members who had, through Ibarra, complained of the lack of union initiative to him, Yurasko surely would not have waited almost 2 weeks after such resumption had been arranged, and practically on the eve of the scheduled negotiation. Most likely, Yurasko would have advised his restless constituency as soon as the Union was able to turn its attention to the Altoona unit. Therefore, in addition to the more convincing demeanor of Respondent's mutually corroborated unbiased witnesses, I conclude that their credibility is bolstered by the overall sequence of events.

Yurasko first met some employees at the Altoona store in the breakroom, but met with the unit employees in the meat department where, according to his own testimony, the Union was subjected to criticism, during the course of a 5-minute meeting. According to Yurasko, Conway, as was his custom on every past occasion, made a "derogatory comment concerning the Union [pension fund]," and related it to the A & P closure which was discussed by the others as well. Burkett asked, "What's going to come up now that's going to hold us up [in negotiation]?" Yurasko responded that Altoona was now the "number one priority" and told the employer, "I'll be back in the near future."[6] Yurasko then went on to

[5] A proffer into evidence of Yurasko's admittedly incomplete notebook was rejected as it was ambiguous and inconclusive, and without probative value.

[6] If a December 2 meeting had been definitely arranged before this meeting, Yurakso would not have used such an indefinite future reference.

defend the Union's preoccupation with the A & P closure, and further informed the employees that its involvement with that complex situation was to continue for a long time. Yurasko pointed out that the loss of 600 A & P jobs and possibly 3500 more Kroger jobs took the precedence over a completion of a contract for 9 persons.

Thompson was located in his office at the front of the store and was able to observe part of the meeting through the large glass windows which enclose the meat department and expose one-third of the department to his office. Thompson testified that the meeting lasted about a half-hour and that at one point he walked into the meat department and overheard what was going on.[7] He characterized what he heard as a "shouting match," and that the employees were visibly upset, but admitted that it was difficult to decipher everything that was said. Thompson overheard Conway accuse the Union of cheating him out of a pension when he had worked for another employer. He testified that the following statements were made. "Kendall was hollering something about not wanting to be represented," and that the Union was responsible for the closure of A & P stores. Musselman said to Yurasko, "George, I got a question for you. What do we have to do to get rid of you?" Thompson, however, conceded that he was not certain whether Musselman was referring to the Union as an institution or had directed the comment to Yurasko personally. However, nowhere in the record is there any evidence of employee dissatisfaction with Yurasko's personal role in representation. Thompson also testified that he listened in on this meeting for no more than a minute and a half, but that he heard no employee voice support for the Union.

Thompson then related his observation to Paul Glosser the next morning and also expressed his personal opinion to Glosser that the majority of employees no longer desired representation by the Union. He repeated his opinion to Glosser several times thereafter.

Analysis

All parties are agreed on the fundamental legal premises giving rise to the issue before me, i.e., an incumbent designated exclusive employee bargaining agent enjoys a presumption of majority status which, after a reasonable period of time to provide bargaining opportunity, may be rebutted by a demonstration of actual loss of majority status, or a showing of a contrary reasonable good-faith belief of the employer which must be demonstrated to have been derived from objective phenomena to which the employer, i.e., its managers and agents, were exposed at the time of making a decision to withdraw recognition. With respect to the later justification, the Board in numerous cases has evaluated a multiplicity of factors that had been proffered as justification for reasonable good-faith belief of loss of majority status. The most probative and convincing of these factors have been employees' own statements made directly to the employer and its agents. However, the Board and the courts have also been called on to evaluate other indicia of loss of majority status, i.e., opinion reports of supervisors, opinion reports of employees, employee expressions of discontent, change in employment complement, presence or absence of other unfair labor practices, state of negotiations, activity or inactivity of the union bargaining agent, vis-a-vis the employees, the original margin of majority designation, i.e., closeness of original majority designation, etc. The Board, and the courts, at times in disagreement with the Board, have relied on or in part not relied on some of these factors as they have been presented in a variety of factual configurations. Respondent and the General Counsel cite numerous cases to support their respective arguments. Essentially their positions are as follows.

Respondent argues that a majority of employees expressed to Respondent their desire for nonrepresentation but that, in any event, even if only a minority did so, there exists within this particular factual constellation sufficient evidence on which to premise a reasonable doubt of union majority status. The General Counsel argues that the evidence does not demonstrate that a majority of unit employees explicitly and clearly expressed to Respondent a desire for nonrepresentation. The General Counsel argues, and cites precedent to the effect, that each element relied on by Respondent, other than express disclaimer to it, is insufficient to justify reasonable doubt of majority status. The General Counsel addresses each separate element relied on by Respondent and methodically attacks its individual probative value. However, the General Counsel does not wholly address itself to Respondent's gestaltist contention that, although taken individually each element may not justify reasonable doubt, the cumulative effect does. In effect the General Counsel's position is that each element herein has a zero effect and that the whole cannot equal more than the sum of the parts. The Board recently has reiterated a policy of eschewing mechanistic evaluations of an employer's proffered indicia in support of good-faith doubt. The Board summarized the state of law in this regard in *Sofco, Inc.*, 268 NLRB 159 (1983):

> As the Board stated over 30 years ago in *Celanese Corp.*:
>
> > But its very nature, the issue of whether an employer has questioned a union's majority in good faith cannot be resolved by resort to any simple formula. It can only be answered in light of the totality of all the circumstances involved in a particular case.[5]
>
> Thus, even when a particular factor considered alone would be insufficient to support a good-faith doubt of a union's majority status, the "cumulative force of the combination of factors" may be adequate to support such a doubt.[6] In this regard, we note that a respondent does not bear the burden of proving that an actual numerical majority opposes the union.[7] However, it must demonstrate that it

[7] His testimony is uncontradicted and is not inconsistent with that of Yurakso as to employee statements. I credit Thompson as to these statements.

had objective reasons for doubting the union's majority status.[8]

[5] 95 NLRB 644, 673 (1951)

[6] *Golden State Habilitation Convalescent Center v. NLRB*, 566 F.2d 77, 80 (9th Cir. 1977), denying enf. of 224 NLRB 1618 (1976); see also *National Cash Register Co. v. NLRB*, 494 F.2d 189 (9th Cir. 1974).

[7] *Laystrom Mfg. Co.*, 151 NLRB 1482 (1965), enf. denied on other grounds 359 F.2d 799 (7th Cir. 1966); see also *NLRB v. Randle-Eastern Ambulance Service*, 584 F.2d 720 (5th Cir. 1978).

[8] *Laystrom Mfg. Co.*, supra.

The evidence in this case reveals the following with respect to employee statements made directly to Respondent's managers, in late summer and fall of 1982. Clear statements of rejection of union representation were made by Conway, Kendall, and Ibarra directly to Manager Thompson, and by Ibarra to Paul Glosser. The General Counsel argues that Thompson's testimony lacks specificity as to dates and details to be of any probative value. I find, however, that Thompson's uncontradicted testimony with respect to the above employees discloses unambiguous statements made at sufficiently identified pre-recognition withdrawal periods of time, and constitutes highly probative evidence. Cf. *Sofco, Inc.*, supra.

Thompson's testimony with respect to employee statements overheard at the November 17 Yurakso-employee encounter presents evidence of an employee statement which the General Counsel argues is ambiguous, i.e., Musselman's question to Yurasko, "George, I got a question for you; what do we have to to to get rid of you?" Although Thompson conceded that Musselman may in fact have been directing his remark to Yurasko personally, Respondent's ultimate conclusion that Musselman was among those employees who no longer wanted representation is reasonable in light of the context of the remark. That context consisted of employee criticisim and frustration directed to the Union's representational performance, and included no expressions of personal dislike for Yurasko. Also to be taken into consideration is the fact that Musselman was hired subsequent to the Union's recognition which was based on four authorizations in a six-person unit. Having heard such remark from this new employee, it was reasonable for Respondent to doubt that he also desired union representation.

The General Counsel also argues that Burkett's statements to Thompson in August should be discounted as merely a natural expression of gratitude for employment made by a formerly laid-off A & P employee. The statement ought not be evaluated solely on its face. Again, the context is critical. Some employees were unequivocally disavowing union representation. Others at the very least were voicing dissatisfaction. At the same time Respondent was doing absolutely nothing to encourage its employees to reject union representation and evidenced to them no motivations nor even a slight preference for such rejection. Against that background the unsolicited statement of a former employee of a unit previously represented by the Union, that he felt that union representation is unnecessary is, I find, sufficient evidence to rebut a presumption that as a post-recognition hiree he desired union representation. The General Counsel cites *Grand Lodge of Ohio*, 233 NLRB 143, 144 (1977), to support a contrary conclusion. However, similar statements in that case were made in a different context and were related to union membership and cost of union membership and were not, as herein, made in direct reference to union representation.

In addition to the foregoing statements, Respondent also had good reason to believe that unit member Maus did not form the part of the Union's majority base. Maus, like Conway, refused to sign a union representation authorization card. There is no evidence that he thereafter authorized representation. Respondent was shown only four cards as part of the Union's proffered evidence of majority status. The General Counsel argues that there is no evidence to demonstrate rejection of union representation expressed to Respondent by Maus. However, I conclude that there is no basis to presume that Maus authorized union representation merely because the Union was certified subsequent to his original refusal to authorize representation. Rather, I conclude that it was reasonable for Respondent to infer that Maus did not authorize union representation when recognition was first demanded and that, in the absence of any contrary evidence, he still did not wish to authorize representation. I therefore conclude that it was reasonable for Respondent to have come to a reasonable doubt that six of the nine unit employees desired union representation.

Assuming, however, that the statements of Musselman and Burkett are too inconclusive to warrant a reasonable doubt as to their desires for union representation even within the aforedescribed context, I conclude that other factors present in this case, in combination with these employee expressions, justified a reasonable doubt in the mind of Respondent.

Respondent's conduct whether reasonable or not was clearly premised in good faith. It had no motivation to withdraw from bargaining nor from the bargaining relationship nor even had a preference for such conduct. There is no evidence that it was adverse to the way negotiations were proceeding. There was no impasse reached in bargaining. There was no bad-faith bargaining nor any other employer conduct inimical to employees' organizational or representational rights. There was a hiatus in bargaining, but this was due to the conduct of the Union which departed from the bargaining table with a "don't call me, I'll call you" attitude. Coterminously there was the virtual absence of the Union at the jobsite, i.e., few visitations, no steward, no employee participation in bargaining, etc. Whether the Union's conduct was obliged by pressing business elsewhere is not material. But that conduct, as well as the complaints and disaffection of employees, was made manifest to Respondent by way of statements made to Thompson and by way of Ibarra's reports.

Into the foregoing factual mix, Respondent was exposed to the statements of three new employees, one of whom unequivocally rejected the Union, and two of whom at the very least expressed disaffection with the Union's representation performance. Respondent was also the recipient of unsolicited rejections of union representation from an original authorization card signer whose leadership function on behalf of the Union may or

may not have been known to it, as well as the continued expressed opposition of a noncard signer, and the silence of an original nonauthorization card signer.

The General Counsel is correct that many of such individual elements are of themselves insufficient to warrant reasonable doubt. Thus mere hiatus in, or stalled, negotiations is not conclusive where it only evidences inactivity in the union-employer relationship (but not, as here, known inactivity in the union-employee relationship). *Flex Plastics*, 262 NLRB 651 (1982), enfd. 726 F.2d 272 (6th Cir. 1984).

Expressions of employee frustration over the failure to negotiate a contract do not necessarily evidence employee rejection of representation. However, in *Republic Engraving & Designing*, 236 NLRB 1150, 1156 (1978), cited by the General Counsel, such evidence was discounted because it was spawned in consequence of the employer's unlawful conduct. In the cited case of *Thomas Industries*, 255 NLRB 646, 647 (1981), the criticisms of the union by a third of the employees were coupled with references to a disinclination of members to pay dues. The Board in that case discounted the cumulative effect of these expressions inasmuch as they were reinforced only with generalized subjective impressions of supervisors based on their generalized "knowledge of the people" in their departments and with the decline of union checkoffs. The employer therein was also found guilty of other unfair labor practices. The General Counsel also cites *NRTA-AARP Pharmacy*, 210 NLRB 443 (1974), and *Montgomery Ward & Co.*, 210 NLRB 717 (1974). However, these cases are factually distinguishable from the cases herein, and involve coercive employer polling of employees.

With respect to reports by supervisors and employees, the General Counsel is correct that such factor is often discounted by the Board, as in *Thomas Industries*, supra. However, in that case the Board did not reject such evidence outright, but rather noted that subjecting estimates of supervisors and employees as to the state of desires of a majority of employees was slight as compared to the protective force of actual employee statements.[8]

In *Cornell of California*, 222 NLRB 303 (1976), cited by the General Counsel, the employer based his doubt on reports of disaffection from a minority of unit employees (less than a third), and their mere assertion that a majority of the unit wished to be unrepresented. Also cited by the General Counsel is *Landmark International Trucks*, 257 NLRB 1375, 1384 (1981). In that case, however, the employer relied on certain correspondence which it had unlawfully solicited, but which in any event related only to membership resignation and dues checkoff. That employer also relied on the statements of 2 of 20 unit employees of "disenchantment with the Union and disinclination to be members of [it] or pay dues," and the report of 1 employee which merely asserted that all unit members had withdrawn from union membership.

I find nowhere in the authority relied on by the General Counsel a clear holding which excludes from consideration of a cumulative effect any of the foregoing factors discussed. Thus, as Respondent correctly argues, the Board has taken into consideration such factors as expressed dissatisfaction by a minority of employees, the lack of representational activity by the Union, including bargaining hiatus, employee turnover, and an employee poll. *Taft Broadcasting*, 201 NLRB 801 (1973). In *Lloyd McKee Motors, Inc.*, 170 NLRB 1278 (1968), the Board relied on union inactivity following protracted bargaining, changes in the union negotiation team, unfilled steward vacancy, considerable employee turnover, opinion reports of supervisors, a representation by the chief union negotiator that he had not heard from the union representative in over a month, and the Board concluded that the cumulative effect sufficiently raised a reasonable doubt of majority status. A similar result can be seen in *Southern Wipers*, 192 NLRB 816 (1971).

In *Naylor, Type & Mats*, 233 NLRB 105, 108 (1977), the Board was presented with a 31-person unit of employees of whom, according to the testimony of 2 managers, only 13 had made statements of clear representation rejection. A presumption was made by the Board that three more employees did not desire representation because they formed a segment of the unit, i.e., job classification that had never been represented, in fact, by the Union. However, also evaluated and relied on was the testimony by a manager as to his receipt of oral reports of employees of headcounts of other employees as to rejection of representation, as well as employee headcounts of membership rejection. It was, of course, conceded that such evidence would not of itself be persuasive in the absence of other factors. In that case, there was only evidence of a minority of employee expressions, but yet the cumulative effect of these other factors was relied on by the Board. Therefore, in the instant case, assuming that Musselman and Burkett's statements were not clear rejections of representation, consideration must be taken of all the other indicia, including the opinion reports of Meat Manager Ibarra who occupied the unique position of confidant to both employer and employees. His reports were not mere subjective conclusions but were based on his direct conversations with employees which included clear rejections of representation not only by Conway and Kendall, but also by Gardner, one of the original card signers. Ibarra's opinion cannot be characterized as having been postulated on mere subjective conjecture. It was based on the clear knowledge that four unit members, including himself, explicitly rejected representation; that another, Maus, had refused to authorize representation in the first place; and that two more, Musselman and Burkett, had announced an intention to reject the Union if nothing were done quickly by the Union and that afterward indeed nothing was done and that the unit members had undergone a fruitless and hostile encounter with Yurasko.

I find that based on Ibarra's report in addition to the direct employee statements made to Store Manager Thompson, Paul Glosser could, with fair certainty, conclude that Conway, Kendall, Ibarra, and Gardner did not

[8] The Board cited *Roza Watch Corp.*, 249 NLRB 284, 286 (1980), a case where the only basis relied on by the employer was the "assertion of some employees made to a member of management at a social gathering that a majority of their members wanted to get out of the Union."

want union representation, and further he could reasonably conclude that the Union's majority was doubtful in light of the original nondesignation of it by Maus, the expressions of disaffection of a clear majority of unit members, the inactivity of the Union in the employee-union relationship, the clear rejection of representation of one-third of the new employees and expressions of disenchantment, if not outright rejections of representation of all of the new employees.

I conclude therefore that Respondent has adduced sufficient probative evidence[9] to establish that recognition was withdrawn as a result of a good-faith reasonable doubt of majority status, and I therefore recommend the following[10]

ORDER

The complaint is dismissed.

[9] The General Counsel adduced no evidence of actual majority status but, in light of my finding, it is unnecessary to determine that issue.

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.